

The Impacts of Lawsuits Against Local Governments for Business Damages

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A Detailed Look at SB620/CS/HB569 & CS/SB280/HB403

The “home rule” provisions contained in Florida’s Constitution afford broad powers to local governments, including the power to pass and enforce local ordinances. This broad home rule authority is limited by “preemption,” where the state or federal government has already legislated an issue, and standards of reasonableness.¹ Local governments are precluded from passing ordinances that are inconsistent with the State Constitution or state or federal law, or that are unreasonable or arbitrary. Anyone who is adversely affected by a local ordinance may initiate a cause of civil action against the local government.

The 2022 Florida Legislature is debating two pieces of legislation that add to the process of passing local ordinances and provides additional rights to businesses and residents who wish to challenge those ordinances. Bills under consideration include:

- **SB620/CS/HB569** --- Authorizes businesses that have been operating in Florida for at least three years to bring suit against local ordinances that directly result in a 15 percent loss—or projected loss—of profit and recover damages.
- **CS/SB280/HB403** --- Requires municipal and county governments to prepare a business impact estimate before the enactment of an ordinance; requires

ordinances to be suspended if challenged as being preempted by the state or is arbitrary or unreasonable; and allows the courts to award attorney fees, costs, and damages to the complainant if it prevails. The two bills were identical when filed, but SB280 has been amended extensively, favorably addressing a number of stakeholder concerns.

Florida TaxWatch undertakes this independent review to better understand the potential impacts of this suite of legislation on local governments, Florida businesses, and on the Florida taxpayer.

What Are the Overall Effects of These Bills?

Collectively, these four bills add to the process of passing local ordinances and provides additional rights to residents and businesses who wish to challenge those ordinances, including allowing businesses to sue to recover lost profits.

CS/SB280 and HB403

CS/SB280 has changed considerably through the committee process, addressing several significant concerns, and the result is a much better bill. The bill requires local governments to produce and publish on the local government’s website a “business impact estimate”² before passing an ordinance. In addition, once a lawsuit challenging the validity of a local ordinance is filed, the local ordinance is suspended until final disposition. This includes appeals, although if the local government prevails in the lower court, the court

¹ The Professional Staff of the Committee on Rules, “CS/SB280 Bill Analysis and Fiscal Impact Statement,” The Florida Senate, January 19, 2022.

² The estimate must include certain information, such as the proposed ordinance’s purpose, estimated economic impact, and costs to comply.

may lift the suspension. Under CS/SB280, a complainant who successfully challenges an ordinance adopted after October 1, 2022, as being unreasonable or arbitrary may receive up to \$50,000 in attorney fees. A prevailing local government may not recover attorney fees. The bill allows the court to sanction the attorney or represented party if it concludes the lawsuit is frivolous or was filed for other improper purposes.³ Ordinances addressing emergencies, growth management, fire prevention codes, building codes, and other specified ordinances are expressly exempt from these provisions.

As of January 25, HB403, which was identical to SB280 when the two bill were filed has not been amended. Like CS/SB280, HB403 requires local governments to produce and publish on the local government's website a "business impact statement" before passing an ordinance, but the statement must contain much more detail and analysis. The statement must also be considered by the court, along with the economic impact, when an ordinance is challenged as being arbitrary or unreasonable. In such cases, attorney fees that can be recovered if the complainant prevails are not capped at \$50,000. The court would not have the ability to lift the suspension of the ordinance during appeals when the local government prevails in lower court. There is no ability for sanctions if the suit was filed for frivolous or improper reasons. The bill also contains fewer types of exempt ordinances.

Florida TaxWatch considers the proposed requirement that local governments produce and publish on the local government's website a business impact statement before passing an ordinance to be a good thing; however, care must be taken not to place too large a burden on local governments or the taxpayers. A formal business impact estimate or statement can be expensive to produce, especially if that estimate can be used as evidence in a complaint challenging a new ordinance as

arbitrary or unreasonable. The language in SB280 as amended better achieves those goals.

Currently, complainants can challenge local ordinances on the grounds that they are preempted by state law or are arbitrary and unreasonable. In these cases, courts determine if an ordinance is rationally related to a legitimate government interest. There is no interest if there is no apparent benefit, such as protecting the health, welfare, safety, and quality of life, to the citizens, or if the benefit only applies to non-residents, or the government has attempted to frustrate the purpose of another governmental entity. Courts rarely find that ordinances lack a government interest.⁴

Perhaps the most concerning provision of this legislation is the requirement that a challenged ordinance must be suspended for the duration of the lawsuit, including appeals.⁵ There are limited opportunities for a "cure." The only cure option is to repeal the entire ordinance --- the ordinance cannot be amended to remove the offending provision. The party challenging the ordinance must request suspension in the initial complaint or petition. The bill does provide for expedited court review for these cases. The suspension provision raises the possibility of one person or entity halting enforcement of an ordinance, and the public benefits it may provide, even if the complaint raised is not a legitimate one.

The legislation attempts to mitigate the length of this suspension by requiring the courts to give cases in which enforcement of the ordinance is suspended priority over other pending cases and render a preliminary or final decision "as expeditiously as possible." During the COVID-19 pandemic, Florida's court system faced unprecedented challenges as it struggled to adapt to the new public health and safety protocols while ensuring that litigants continued to have access to the courts. According to Supreme Court Chief Justice Charles

³ Such as to harass or to cause unnecessary delay, or for economic advantage, competitive reasons, or needless increase in the cost of litigation.

⁴ Senate Committee on Community Affairs, Bill Analysis and Fiscal Impact Statement, SB280, January 12, 2022.

⁵ SB280 would allow an appellate court to lift the suspension if the local government prevailed in the lower court.

Canady, as of July 1, 2021, there were more than 1,000,000 unresolved cases above what would have normally been expected on that date.⁶ It is unclear to what extent the courts can “expeditiously” render a decision on challenged ordinances.

Requiring a formal business impact estimate, especially if it can be used to challenge an ordinance in court, could create an undue financial burden for local governments and taxpayers. The legislation has been amended to state that local governments are not required “to procure an accountant or other financial consultant to prepare the business impact estimate,” presumably to lessen the financial burden on them and to address the possibility that the legislation is an unfunded mandate;⁷ however, if the estimate must stand up to legal scrutiny, outside consultants may be necessary, something many local governments simply could not afford. The provisions regarding business impacts statement that are contained in SB280 should remain in any version of the bill that may pass this session.

CS/HB569 and SB620

CS/HB569 and SB620 are similar. Both bills permit a business to claim business damages from a local government if the local government enacts or amends an ordinance that has or will cause a reduction of at least 15 percent of the business’s profit and the business has operated in Florida for at least three years before the ordinance is enacted or amended. The bills identify a number of exemptions for which the local government has no liability. These include emergency ordinances; ordinances required to comply with state or federal laws; growth management ordinances; among others.

Businesses seeking damages must submit a “good faith” written settlement offer to the local government that enacted or amended the relevant ordinance within 180 days before filing a lawsuit and within 180 days after the relevant ordinance’s enactment or adoption. The settlement offer must:

- Include an explanation of the nature, extent, and monetary amount of the damages alleged;
- Be prepared by the business owner, a certified public accountant, or a business damage expert familiar with the business’ nature and operations; and
- Be accompanied by copies of substantiating business records.

Within 120 days after receipt of the good faith settlement offer and accompanying records, the local government must, by certified mail, accept or reject the offer or make a counteroffer. If the business fails to respond to or rejects the offer, the business’s counteroffer is deemed to be zero dollars for purposes of calculating attorney fees. If the claim is not settled, the business may, within one year of the effective date of the enactment or amendment of the relevant ordinance, file a lawsuit to recover its business damages and attorney fees.

The legislation identifies business records (e.g., income tax returns and withholding statements, balance sheets, profit and loss statements, etc.) that are suggested for use in supporting the complainant’s claim of business damages. Courts can generally be expected to look for a “rational nexus” showing how the ordinance created or caused the alleged business damage. Florida TaxWatch thinks this will be a daunting challenge for a business since there are many other factors (especially in post-pandemic Florida) that could be the reason for a business’ declining revenues and profits. For example, restaurants that are having difficulty recruiting and retaining cooks or wait staff may experience declining revenues and profits. So too may retail businesses whose sales and profits are adversely affected by a shortage of products caused by supply chain disruptions.

⁶ The Florida Bar, “Canady Lays Out Path for Courts’ Return to Normalcy,” Florida Bar News, June 14, 2021, retrieved from <https://www.floridabar.org/the-florida-bar-news/canady-lays-out-path-for-courts-return-to-normalcy/>, January 20, 2022.

⁷ Article VII, section 18 (a) of the Florida Constitution provides that a county or municipality is not bound by a general law that requires the expenditure of funds unless certain specified exemptions or exceptions are met. The Senate Staff Analysis of SB280 dated January 19, 2022, states that “none of the constitutional exceptions appear to apply.”

What Are Some of the Unintended Consequences?

As is the case with most legislation, passage of this suite of these bills is likely to have unintended consequences.

Increased Financially Motivated and Malicious Lawsuits

Florida is a litigious state and passage of this suite of bills will likely add to that. In a 2019 study by the U.S. Chamber for Legal Reform, Florida's lawsuit climate ranked 46th among the 50 states. Only Mississippi, California, Louisiana, and Illinois ranked below Florida. The City of Miami ranked among the ten worst jurisdictions in the U.S. Since 2012, Florida's ranking has decreased from 41st to 46th.⁸ In 2017-18, for the first time in the 16-year history of the "Judicial Hellhole" report, Florida ranked as the nation's worst Judicial Hellhole.⁹

A January 2016 Florida TaxWatch report¹⁰ examined the impacts of financially motivated and malicious public records practices on public and private entities. Florida's public records laws were being intentionally misused by unscrupulous predators who filed numerous public records requests with public agencies and private businesses doing business with public agencies, and then sued them for non-compliance with the requests. These public records requests served no public interest and were filed with the intent of creating confusion that resulted in a lawsuit, with the intent of securing a cash settlement.

The provisions in these bills that permit local businesses to allege damage resulting from a local ordinance make local governments more vulnerable to financially motivated and malicious lawsuits filed with the intent of securing a cash settlement. Local government agencies are also more vulnerable to disruptions in work and overburdened staff as a result of the additional volume of

lawsuits. It is important to note that not all lawsuits will result in a cash settlement --- some local government, at great expenditure of money and staff time, will fight back.

Attorney Fees

The provisions in these bills that address the recovery of costs and award of attorney fees are "one way" provisions --- there is no expressed scenario where a local government can recover its costs or be awarded reasonable attorney fees. Only those who file a successful claim of business damage, settle a claim of business damage, or successfully challenge the validity of a local ordinance are eligible to recover these expenses. This is patently unfair to local governments who must defend themselves against all claims and challenges, those that are valid and those that are financially motivated, malicious, and filed with the intent of securing a cash settlement.

Speculative or Collateral Damages

The legislation does not make it clear that any alleged business damage or loss must be directly caused by or the direct result of the ordinance in question, nor is the calculation of damages limited to those damages that are directly caused by the ordinance. This places taxpayers on the hook for a host of speculative, remote, or collateral damages that cannot be traced directly to the ordinance.

Unfunded Mandate

It is unclear whether the requirement that local governments produce and publish on the local government's website a "business impact estimate" before passing an ordinance constitutes an unfunded mandate from the legislature. Article VII, Section 18 of the Florida Constitution states that no county nor municipality "shall be bound by any general law requiring such county or municipality to spend funds." Unless the cost to local governments is deemed to be insignificant, the requirement for business impact estimates by SB280 and HB403 may conflict with the Florida Constitution.

8 U.S. Chamber Institute for Legal Reform, "2019 Lawsuit Climate Survey Ranking the States," September 2019.

9 ATR Foundation, "Judicial Hellholes," retrieved from <https://www.judicialhellholes.org/hellhole/2017-2018/florida/>, January 19, 2022.

10 Florida TaxWatch, "Predatory Public Records Requests," January 2016.

Broad Scope Opens Additional Vulnerabilities

Even with the newly amended exemptions, SB620 and HB569 could inadvertently apply to ordinances that seem unrelated. During a legislative committee meeting on SB620, community stakeholders listed a variety of ordinances that may become the target of suits, including resiliency ordinances, regulation of businesses, incentive programs for small businesses, public health measures, and general ordinances meant to affect all the community, such as noise or traffic ordinances. Amendments to existing ordinances adopted after October 1, 2022, could open the door for claims, even if the amendment is technical in nature.

Strict Liability

These bills are constructed in a way that holds local governments to strict liability. Within tort law, it is unusual to see strict liability beyond abnormally dangerous activities or the possession of certain animals.¹¹ This is a stringent standard to impose upon local governments, especially considering local governments lack opportunities to cure or mitigate their risks. Further, there are no provisions that require a business owner to attend public hearings on proposed ordinances or that require a business owner to notify the local government that an ordinance, if adopted, would allegedly cause damage to the business. Including such requirements would give a local government a better idea of any prospective claims if the ordinance is adopted, and reduce the chances that loss to the business could come as a surprise to the local government.

Negative Impact on Actions Supported by the Voters

The ability of a local government to take actions that may have the overwhelming support of the voters will be curtailed under this legislation. For example, proposed ordinances that limit the hours in which alcohol can be

sold, or that shutter strip clubs or puppy mills, etc., would almost certainly face claims of business damage. Local governments must weigh the risks of any ordinances that restrict unpopular existing businesses even if the restriction has the overwhelming support of the voters. Local governments cannot legally remove a voter-approved initiative from the ballot based on potential damages or fiscal impact. Such removal would require a separate voter referendum.

Impacts on Small and Fiscally Constrained Local Governments

The legislation adds unnecessary costs to taxpayers in small and fiscally constrained local governments. Many of these local governments will incur costs for assessing claims, but they lack employees equipped to analyze claims and the budget to pay them.

What Are the Fiscal Impacts?

Under the proposed legislation, local governments would be liable for business damages directly resulting from the enactment of an ordinance or charter provision. Business damages, in this context, refer to lost profits (exceeding 15 percent) and reduced profit-making capacity attributable to a local ordinance. A newly created cause of action would enable Florida businesses in operation for at least three years to bring a lawsuit against local government entities, prescribing a pre-suit process and parameters for attorneys' fees and other legal expenses.¹²

For many local governments, increased exposure to liability and risk carries with it budgetary and fiscal impacts that taxpayers ultimately bear. Since a prevailing business may be allowed to recover costs and be awarded attorney fees, local governments will be required to build these additional costs into their legal department budgets and then make sure they have the revenue to cover the costs. It is fair to assume that passage of these

¹¹ Legal Information Institute, "Strict Liability," retrieved from [Strict Liability | Wex | US Law | LII / Legal Information Institute \(cornell.edu\)](#), January 18, 2022.

¹² The Florida Senate, Bill Analysis and Fiscal Impact Statement for SB620, Nov. 29, 2021. Accessed on Jan. 18, 2022. The Florida House of Representatives, Bill Analysis and Fiscal Impact Statement for HB569, Jan. 14, 2022. Accessed on Jan. 18, 2022.

bills will result in more lawsuits filed against local governments. When this happens, one of two things is certain:

- The local government will increase taxes and fees, increases borne by the taxpayers, to cover the projected increased legal costs; or
- The local government will reduce the level of services currently provided to the taxpayers.

Either way, Florida taxpayers, including the businesses these bills are designed to support, are going to pay.

To estimate the potential annual costs for Florida's local governments and taxpayers, the methodology used in this analysis considers publicly-reported expenditure data for Florida's counties and municipalities for the fiscal year that ended September 30, 2020. The data, which come from the Legislature's Office of Economic and Demographic Research (EDR), show that local government expenditures in fiscal year 2019-20 total approximately \$90.5 billion.¹³ Since legal fees, settlements, and judgments are typically paid out from a locality's general fund or a shared insurance pool, it can be reasonably assumed that any increase in liability risk translates into higher expenditures for the local governments.¹⁴

To estimate just how much these bills could increase annual local government expenditures, Florida TaxWatch relied on a 2016 study published in the *UCLA Law Review* which found that, on average, total government liability costs for all activities amount to around one percent of annual expenditures.¹⁵ Florida TaxWatch considers one percent as a conservative benchmark for this analysis. If the total annual local government expenditures were

increased by just one percent to reflect the estimated additional costs attributable to these bills (e.g., attorney fees, pre-suit settlements, etc.) annually would be estimated at \$905 million annually.

A 2019 economic study by the National Federation of Independent Businesses (NFIB) found that excessive torts in Florida result in an annual \$679.4 million in foregone local government revenues.¹⁶ This suggests our current estimate may constitute a conservative lower bound estimate when compared to the actual realized costs.

Increased expenditures at the local level translate into additional costs for the average taxpayer. Whether localities must raise new revenue to pay for the added costs or reduce services provided in the community, Florida taxpayers will incur the ultimate cost of heightened litigation. Florida TaxWatch estimates the per-capita cost of the additional litigation by dividing the \$905 million by the state's overall 2020 population. This results in an estimated per capita cost of approximately \$42.01.¹⁷

In addition to the costs estimated in this present analysis, there are secondary fiscal effects of the proposed legislation and unintended incentives that warrant further consideration. From a risk management perspective, any increase in financial risks—such as the case when localities are liable to pay for business damages—has the potential to increase the cost of insurance, lower bond ratings, and increase the cost of borrowing for local governments. When not carefully considered, increasing the cost of borrowing can negatively impact a local government's ability to pursue capital improvement plans in the future or provide adequate services to its residents.

13 Florida Office of Economic and Demographic Research (EDR), "Statewide Expenditures and Revenues Reported by Florida's Counties, Municipalities, and Independent Special Districts," Last Revised on Jan. 12, 2022.

14 *UCLA Law Review*, "How Governments Pay: Lawsuits, Budgets, and Police Reform," Jun. 4, 2016. Note: Payments coming from a shared insurance pool still represent an expenditure to local governments since liability insurance premiums would eventually rise to reflect higher risk pools.

15 *UCLA Law Review*, "How Governments Pay: Lawsuits, Budgets, and Police Reform," Jun. 4, 2016. and *Governing*, "City Lawsuit Costs Report," Oct. 27, 2016.

16 The Perryman Group (On Behalf of The National Federation of Independent Businesses), *Economic Benefits of Tort Reform: An Assessment of Excessive Tort Costs in Florida*, Nov. 2019.

17 The estimated additional costs of litigation (\$905 million) divided by the state's 2020 population (21,538,187) equals \$42.01.

There is also the potential for the proposed legislative changes to create a perverse incentive for local governments to settle business claims in the pre-litigation stage, even if claims are unsubstantiated by accompanying documents. Due to the one-way attorney fee schedule, even if disputes are resolved in the pre-suit stage, local governments would still be responsible for paying attorneys' fees. Over time, a combination of numerous lawsuits and an incentive to settle early may balloon expenditures for local governments, raising costs for taxpayers in the end.

Conclusions and Recommendations

Whenever a government at any level enacts a new law or ordinance or amends an existing one, it should carefully consider the impact the change would have on its taxpayers, including the added costs or lost revenues businesses might experience. Florida TaxWatch understands and appreciates the legislature's interest in providing businesses with additional opportunities for redress when local governments pass ordinances that create economic injury. The idea of "making a business whole" when a new or amended ordinance or charter provision directly impacts their expenses or revenues in an excessive and extraordinary way (when the new law does not treat everyone, or at least similarly situated businesses, the same) makes sense on the surface. But this legislation being considered by the 2022 Legislature raises some concerns.

These bills will likely be viewed by those who believe the best decisions are those made closest to the people as a broad overreach on the part of the legislature, preempting local government home rule authority, increasing the costs of local government, and imposing unfunded mandates. The legislation provides no remedies for local governments to mitigate their risk.

Florida TaxWatch believes the requirement that local governments produce and post on their websites a business impact statement before an ordinance is passed is a good idea. If the business impact statement must stand up to legal scrutiny, however, outside consultants may be necessary --- something many local governments simply will not be able to afford. Caution should be exercised to make sure this requirement does not create an undue financial burden on local governments or that it does not create an unfunded mandate from the legislature. Amendments to SB280, which have significantly reduced the cost to local governments of these impact estimates, should remain in the final bill.

Florida TaxWatch finds the provision that would permit the suspension of an ordinance for the duration of the lawsuit, including all appeals¹⁸, of great concern. Although the party challenging the ordinance must request the suspension in the initial complaint or petition, this still raises the possibility that one challenger could toll enforcement of an ordinance, and the public benefits it may provide, even if the complaint raised is ultimately determined to be invalid or illegitimate.

Florida TaxWatch thinks the "one way" attorney fee provisions in these bills are simply unfair to local governments. There are no scenarios where a local government can recover its costs or be awarded reasonable attorney fees --- only those who file a successful claim of business damage, settle a claim of business damage, or successfully challenge the validity of a local ordinance are eligible to recover these expenses. Local governments must defend themselves against all claims and challenges, those that are valid and those that are financially motivated, malicious, and filed with the intent of securing a cash settlement.

Florida TaxWatch thinks the additional lawsuits and legal challenges that arise from the passage of these bills will further burden and clog Florida's judicial system.

¹⁸ Unless the local government prevails in the lower court.

Taxpayers can expect to see more lawsuits and challenges filed, and the cost of government is estimated to increase by more than \$900 million annually as a result. Florida taxpayers will be asked to either pay more taxes to cover the added costs of business damages, attorney fees, and preparing financial impact estimates or accept reduced levels of local services. Either way, Florida taxpayers, including the businesses these bills are designed to support, are going to pay.

Florida TaxWatch thinks business filing claims alleging business damage resulting from the enactment of a local ordinance will have a difficult time showing a rational nexus between the ordinance and the alleged damage. There are so many factors in post-pandemic Florida that could explain a businesses' declining revenues and profits. Shortages of personnel and materials, supply chain disruptions, new competitors eating into a businesses' market share, etc., all have the potential to adversely affect Florida businesses, so figuring out which damages are the result of a local ordinance, and which are the result of something else, may prove to be challenging.

As with many bills, these bills are likely to have unintended consequences. The possibility exists that the number of financially motivated and malicious lawsuits, and their associated costs, will increase. The one-way attorney fee provisions mean that, even if a local government successfully defends itself against a claim or lawsuit alleging business damages, the local government cannot recover its costs and attorney fees. It is unclear whether the requirement that local governments produce and publish on the local government's website a "business impact estimate" before passing an ordinance constitutes an unfunded mandate from the legislature which, if it is, would be unconstitutional. It is also unclear whether these bills create conflicts or vulnerabilities for other local ordinances.

Florida TaxWatch commends the Florida Legislature for its efforts to improve SB280, and recommends the following measures be considered to continue to strengthen these bills and mitigate their adverse impacts on local governments and taxpayers:

1. Language should be added to the bills that defines business damages as those damages that directly and immediately result from enforcement of the ordinance or charter against the business, and do not include losses that are collateral to, or that result indirectly, from enforcement of the ordinance. Business damages may not be speculative, remote, or the result of other intervening causes, but must be reasonably certain and directly linked to the ordinance.
2. Measures should be put into place that deter financially motivated and malicious lawsuits without infringing on the rights of complainants filing legitimate lawsuits. This solution will help weed out those who are "gaming the system" by filing lawsuits with the intent of obtaining a cash settlement instead of redressing economic injury and recovering lost profits.
3. Consideration should be given to making the assessment and awarding of attorney fees discretionary, even if the court determines that the ordinance enacted by the local government local government is valid.
4. Consideration should be given to including a "two-way" attorney fee provision in which the complainant would be entitled to recover costs and attorney fees incurred from the time the action was filed if the complainant prevailed and the court determined that the complainant's settlement offer was a bona fide offer that would have resolved the claim fairly. This is only fair, since filing a civil action is the only remedy currently available to the complainant to enforce the provisions of the bills. Conversely, the local government would be entitled to recover costs

and attorney fees incurred from the time the action was filed if the local government prevailed and the court determined that the complainant's claim was frivolous or served no legitimate purpose or interest, or that settlement offer was not a bona fide offer that would have resolved the claim fairly. This too is fair, since local governments should not be expected to assume the costs incurred while defending themselves against lawsuits related to malicious or financially motivated damage claims.

5. Consideration should be given to requiring any claim of business damages to be accompanied by evidence (e.g., public hearing transcript, correspondence to the local government, etc.) that the business notified the local government that adoption of the proposed ordinance would cause business damage.
6. Consideration should be given to authorize the courts to strike a charter proposal from the ballot upon receipt of a petition by the local government showing that the proposal will cause 15 percent losses to businesses, or to allow the court to invalidate a charter provision that would cause such damages.
7. Consideration should be given to exempt fiscally constrained governments and local governments in rural areas of economic concern.

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